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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**

10 PHYSICIANS HEALTHSOURCE, INC.,

11 Plaintiff(s),

12 v.

13 MASIMO CORPORATION, et al.,

14 Defendant(s).
15
16

Case No. 8:14-cv-00001 JVS (ADSx)

PROTECTIVE ORDER

17 **I. PURPOSES AND LIMITATIONS**

18 A. Discovery in this action is likely to involve production of confidential,
19 proprietary, or private information for which special protection from public
20 disclosure and from use for any purpose other than prosecuting this litigation
21 may be warranted. Accordingly, the parties hereby petition the Court to enter
22 the following Protective Order. The parties acknowledge that this Order does
23 not confer blanket protections on all disclosures or responses to discovery and
24 that the protection it affords from public disclosure and use extends only to the

1 limited information or items that are entitled to confidential treatment under
2 the applicable legal principles. The parties further acknowledge, as set forth in
3 Section XIII(C), below, that this Protective Order does not entitle them to file
4 confidential information under seal; Civil Local Rule 79-5 sets forth the
5 procedures that must be followed and the standards that will be applied when a
6 party seeks permission from the Court to file material under seal.

7 **II. GOOD CAUSE STATEMENT**

8 A. This action is likely to involve trade secrets, customer and pricing lists
9 and other valuable research, development, commercial, financial, technical
10 and/or proprietary information for which special protection from public
11 disclosure and from use for any purpose other than prosecution of this action is
12 warranted. Such confidential and proprietary materials and information consist
13 of, among other things, confidential business or financial information,
14 information regarding confidential business practices, or other confidential
15 research, development, or commercial information (including information
16 implicating privacy rights of third parties), information otherwise generally
17 unavailable to the public, or which may be privileged or otherwise protected
18 from disclosure under state or federal statutes, court rules, case decisions, or
19 common law. Accordingly, to expedite the flow of information, to facilitate the
20 prompt resolution of disputes over confidentiality of discovery materials, to
21 adequately protect information the parties are entitled to keep confidential, to
22 ensure that the parties are permitted reasonable necessary uses of such material
23 in preparation for and in the conduct of trial, to address their handling at the
24 end of the litigation, and serve the ends of justice, a protective order for such

1 information is justified in this matter. It is the intent of the parties that
2 information will not be designated as confidential for tactical reasons and that
3 nothing be so designated without a good faith belief that it has been maintained
4 in a confidential, non-public manner, and there is good cause why it should not
5 be part of the public record of this case.

6 **III. DEFINITIONS**

7 A. Action: This pending federal law suit.

8 B. Challenging Party: A Party or Non-Party that challenges the designation
9 of information or items under this Order.

10 C. “CONFIDENTIAL” Information or Items: Information (regardless of how
11 it is generated, stored or maintained) or tangible things that qualify for
12 protection under Federal Rule of Civil Procedure 26(c), and as specified above in
13 the Good Cause Statement.

14 D. “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” Information
15 Or Items: Extremely sensitive information (regardless of how it is generated,
16 stored or maintained) or tangible things that qualify for protection under
17 Federal Rule of Civil Procedure 26(c), and as specified above in the Good Cause
18 Statement, including the following exemplary categories: (i) technical
19 information relating to the structure and/or operation of a Party’s products;
20 (ii) licensing and/or settlement-related information; (iii) financial data or
21 information, including information concerning sales, revenue, profit margins,
22 costs, capacity, ROI, capital expenditures, yields, utilization, or similar
23 benchmarks; (iv) customer lists; (v) price lists and/or pricing information; and
24 (vi) budgets, forecasts, and projection.

1 E. Counsel: Outside Counsel of Record and House Counsel (as well as their
2 support staff).

3 F. Designating Party: A Party or Non-Party that designates information or
4 items that it produces in disclosures or in responses to discovery as
5 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
6 ONLY.”

7 G. Discovery Material: All items or information, regardless of the medium
8 or manner in which it is generated, stored, or maintained (including, among
9 other things, testimony, transcripts, and tangible things), that are produced or
10 generated in disclosures or responses to discovery in this matter.

11 H. Expert: A person with specialized knowledge or experience in a matter
12 pertinent to the litigation who has been retained by a Party or its counsel to
13 serve as an expert witness or as a consultant in this Action.

14 I. House Counsel: Attorneys who are employees of a party to this Action.
15 House Counsel does not include Outside Counsel of Record or any other outside
16 counsel.

17 J. Non-Party: Any natural person, partnership, corporation, association, or
18 other legal entity not named as a Party to this action.

19 K. Outside Counsel of Record: Attorneys who are not employees of a party
20 to this Action but are retained to represent or advise a party to this Action and
21 have appeared in this Action on behalf of that party or are affiliated with a law
22 firm which has appeared on behalf of that party, and includes support staff.

1 L. Party: Any party to this Action, including all of its officers, directors,
2 employees, consultants, retained experts, and Outside Counsel of Record (and
3 their support staffs).

4 M. Producing Party: A Party or Non-Party that produces Disclosure or
5 Discovery Material in this Action.

6 N. Professional Vendors: Persons or entities that provide litigation support
7 services (e.g., photocopying, videotaping, translating, preparing exhibits or
8 demonstrations, and organizing, storing, or retrieving data in any form or
9 medium) and their employees and subcontractors.

10 O. Protected Material: Any Disclosure or Discovery Material that is
11 designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’
12 EYES ONLY.”

13 P. Putative Class Member: Any person or entity that fits within the
14 Plaintiff’s class definition but is not named as a party plaintiff.

15 Q. Receiving Party: A Party that receives Disclosure or Discovery Material
16 from a Producing Party.

17 **IV. SCOPE**

18 A. The protections conferred by this Order cover not only Protected Material
19 (as defined above), but also (1) any information copied or extracted from
20 Protected Material; (2) all copies, excerpts, summaries, or compilations of
21 Protected Material; and (3) any testimony, conversations, or presentations by
22 Parties or their Counsel that might reveal Protected Material.

23 B. Any use of Protected Material at trial shall be governed by the orders of
24 the trial judge. This Order does not govern the use of Protected Material at trial.

1 **V. DURATION**

2 A. Even after final disposition of this litigation, the confidentiality
3 obligations imposed by this Order shall remain in effect until a Designating
4 Party agrees otherwise in writing or a court order otherwise directs. Final
5 disposition shall be deemed to be the later of (1) dismissal of all claims and
6 defenses in this Action, with or without prejudice; and (2) final judgment herein
7 after the completion and exhaustion of all appeals, rehearings, remands, trials,
8 or reviews of this Action, including the time limits for filing any motions or
9 applications for extension of time pursuant to applicable law.

10 **VI. DESIGNATING PROTECTED MATERIAL**

11 A. Exercise of Restraint and Care in Designating Material for Protection

12 1. Each Party or Non-Party that designates information or items for
13 protection under this Order must take care to limit any such designation
14 to specific material that qualifies under the appropriate standards. The
15 Designating Party must designate for protection only those parts of
16 material, documents, items, or oral or written communications that
17 qualify so that other portions of the material, documents, items, or
18 communications for which protection is not warranted are not swept
19 unjustifiably within the ambit of this Order.

20 2. Mass, indiscriminate, or routinized designations are prohibited.
21 Designations that are shown to be clearly unjustified or that have been
22 made for an improper purpose (e.g., to unnecessarily encumber the case
23 development process or to impose unnecessary expenses and burdens on
24 other parties) may expose the Designating Party to sanctions.

1 3. If it comes to a Designating Party's attention that information or
2 items that it designated for protection do not qualify for protection, that
3 Designating Party must promptly notify all other Parties that it is
4 withdrawing the inapplicable designation.

5 B. Manner and Timing of Designations

6 1. Except as otherwise provided in this Order (*see, e.g.*, Section
7 B(2)(b) below), or as otherwise stipulated or ordered, Disclosure or
8 Discovery Material that qualifies for protection under this Order must be
9 clearly so designated before the material is disclosed or produced.

10 2. Designation in conformity with this Order requires the following:

11 a. For information in documentary form (e.g., paper or
12 electronic documents, but excluding transcripts of depositions or
13 other pretrial or trial proceedings), that the Producing Party affix
14 at a minimum, the legend "CONFIDENTIAL" or "HIGHLY
15 CONFIDENTIAL – ATTORNEYS' EYES ONLY" (hereinafter
16 "Confidentiality Legend"), to each page that contains protected
17 material. If only a portion or portions of the material on a page
18 qualifies for protection, the Producing Party also must clearly
19 identify the protected portion(s) (e.g., by making appropriate
20 markings in the margins).

21 b. A Party or Non-Party that makes original documents
22 available for inspection need not designate them for protection
23 until after the inspecting Party has indicated which documents it
24 would like copied and produced. During the inspection and before

1 the designation, all of the material made available for inspection
2 shall be deemed "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES
3 ONLY." After the inspecting Party has identified the documents it
4 wants copied and produced, the Producing Party must determine
5 which documents, or portions thereof, qualify for protection under
6 this Order. Then, before producing the specified documents, the
7 Producing Party must affix the "Confidentiality Legend" to each
8 page that contains Protected Material. If only a portion or portions
9 of the material on a page qualifies for protection, the Producing
10 Party also must clearly identify the protected portion(s) (e.g., by
11 making appropriate markings in the margins).

12 c. For testimony given in depositions, that the Designating
13 Party identify the Disclosure or Discovery Material on the record,
14 before the close of the deposition all protected testimony, or within
15 14 days after receipt of the deposition exhibits or transcript.
16 Unless otherwise stipulated in writing, all testimony, transcripts,
17 and exhibits will be treated as "CONFIDENTIAL" until 14 days
18 following the receipt of the transcript and exhibits.

19 d. For information produced in form other than document and
20 for any other tangible items, that the Producing Party affix in a
21 prominent place on the exterior of the container or containers in
22 which the information is stored the legend "CONFIDENTIAL" or
23 "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY." If only
24 a portion or portions of the information warrants protection, the

Producing Party, to the extent practicable, shall identify the protected portion(s).

C. Inadvertent Failure to Designate

1. If timely corrected, an inadvertent failure to designate qualified information or items does not, standing alone, waive the Designating Party's right to secure protection under this Order for such material. Upon timely correction of a designation, the Receiving Party must make reasonable efforts to assure that the material is treated in accordance with the provisions of this Order, including by taking the steps set forth in Section XI below.

VII. CHALLENGING CONFIDENTIALITY DESIGNATIONS

A. Timing of Challenges

1. Any party or Non-Party may challenge a designation of confidentiality at any time that is consistent with the Court's Scheduling Order.

B. Meet and Confer

1. The Challenging Party shall initiate the dispute resolution process under Local Rule 37.1 et seq.

C. The burden of persuasion in any such challenge proceeding shall be on the Designating Party. Frivolous challenges, and those made for an improper purpose (e.g., to harass or impose unnecessary expenses and burdens on other parties) may expose the Challenging Party to sanctions. Unless the Designating Party has waived or withdrawn the confidentiality designation, all parties shall continue to afford the material in question the level of protection to which it is

entitled under the Producing Party's designation until the Court rules on the challenge.

VIII. ACCESS TO AND USE OF PROTECTED MATERIAL

A. Basic Principles

1. A Receiving Party may use Protected Material that is disclosed or produced by another Party or by a Non-Party in connection with this Action only for prosecuting, defending, or attempting to settle this Action. Such Protected Material may be disclosed only to the categories of persons and under the conditions described in this Order. When the Action has been terminated, a Receiving Party must comply with the provisions of Section XIV below. For the avoidance of doubt, the parties shall not use any Protected Material to solicit new clients or recruit additional or superior class representatives in any existing or anticipated litigation, including this case.

2. Protected Material must be stored and maintained by a Receiving Party at a location and in a secure manner that ensures that access is limited to the persons authorized under this Order.

B. Disclosure of "CONFIDENTIAL" and "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" Information or Items

1. Unless otherwise ordered by the Court or permitted in writing by the Designating Party, a Receiving Party may disclose any information or item designated "CONFIDENTIAL" only to:

a. The Receiving Party's Outside Counsel of Record in this Action, as well as employees of said Outside Counsel of Record to

1 whom it is reasonably necessary to disclose the information for this
2 Action, and the Receiving Party's House Counsel;

3 b. The officers, directors, and employees of the Receiving Party
4 to whom disclosure is reasonably necessary for this Action;

5 c. Experts (as defined in this Order) of the Receiving Party to
6 whom disclosure is reasonably necessary for this Action and who
7 have signed the "Acknowledgment and Agreement to Be Bound"
8 (Exhibit A);

9 d. The Court and its personnel;

10 e. Court reporters and their staff;

11 f. Professional jury or trial consultants, mock jurors, and
12 Professional Vendors to whom disclosure is reasonably necessary
13 or this Action and who have signed the "Acknowledgment and
14 Agreement to be Bound" attached as Exhibit A hereto;

15 g. The author or recipient of a document containing the
16 information or a custodian or other person who otherwise
17 possessed or knew the information;

18 h. During their depositions, witnesses, and attorneys for
19 witnesses, in the Action to whom disclosure is reasonably
20 necessary provided: (i) the deposing party requests that the
21 witness sign the "Acknowledgment and Agreement to Be Bound;"
22 and (ii) they will not be permitted to keep any confidential
23 information unless they sign the "Acknowledgment and Agreement
24 to Be Bound," unless otherwise agreed by the Designating Party or

ordered by the Court. Pages of transcribed deposition testimony or exhibits to depositions that reveal Protected Material may be separately bound by the court reporter and may not be disclosed to anyone except as permitted under this Protective Order; and

i. Any mediator or settlement officer, and their supporting personnel, mutually agreed upon by any of the parties engaged in settlement discussions.

2. Unless otherwise ordered by the Court or permitted in writing by the Designating Party, a Receiving Party may disclose any information or item designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” only to the persons who fall within the scope of Paragraphs 1.a, 1.c, 1.d, 1.e, 1.f, 1.g, and 1.i.

3. Unless otherwise ordered by the Court or permitted in writing by the Designating Party, a Receiving Party may not disclose any information or item designated “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” to the persons described in Paragraph 1.c, until

a. The party retaining the expert or consultant provides the opposing Party with a written disclosure that (i) sets forth the expert or consultant’s full name and the city and state of his or her residence, (ii) attaches a copy of the individual’s current resume, (iii) identifies the individual’s current employer(s), (iv) identifies each person or entity from whom the individual has received compensation or funding for work in his or her areas of expertise

1 or to whom the individual has provided professional services,
2 including in connection with a litigation, at any time during the
3 preceding five years, and (v) identifies (by name and number of the
4 case, filing date, and location of court) any litigation in connection
5 with which the Expert has offered expert testimony, including
6 through a declaration, report, or testimony at a deposition or trial,
7 during the preceding five years; and

8 b. The opposing Party does not, within 14 days of receiving the
9 written disclosure, make a written objection setting forth in detail
10 the grounds on which it is based.

11 4. If a timely written objection is made under Paragraph 3.b, the
12 parties must meet and confer to try to resolve the matter by agreement
13 within seven days of the written objection. If no agreement is reached,
14 the Party seeking to make the disclosure may initiate the dispute
15 resolution process under Local Rule 37.1 et seq. The burden of
16 persuasion shall be on the objecting party.

17 **IX. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED**
18 **IN OTHER LITIGATION**

19 A. If a Party is served with a subpoena or a court order issued in other
20 litigation that compels disclosure of any information or items designated in this
21 Action as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’
22 EYES ONLY” that Party must:

23 1. Promptly notify in writing the Designating Party. Such notification
24 shall include a copy of the subpoena or court order;

1 2. Promptly notify in writing the party who caused the subpoena or
2 order to issue in the other litigation that some or all of the material
3 covered by the subpoena or order is subject to this Protective Order. Such
4 notification shall include a copy of this Protective Order; and

5 3. Cooperate with respect to all reasonable procedures sought to be
6 pursued by the Designating Party whose Protected Material may be
7 affected.

8 B. To allow the Designating Party an opportunity to be heard, the Party
9 served with the subpoena or order may not produce the Designating Party's
10 confidential information until at least 10 days after providing notice to the
11 Designating Party. If the Designating Party timely seeks a protective order, the
12 Party served with the subpoena or court order shall not produce any information
13 designated in this action as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL –
14 ATTORNEYS' EYES ONLY" before a determination by the Court from which the
15 subpoena or order issued, unless the Party has obtained the Designating Party's
16 permission. The Designating Party shall bear the burden and expense of seeking
17 protection in that court of its confidential material and nothing in these
18 provisions should be construed as authorizing or encouraging a Receiving Party
19 in this Action to disobey a lawful directive from another court.

20 **X. A NON-PARTY'S PROTECTED MATERIAL SOUGHT TO BE**
21 **PRODUCED IN THIS LITIGATION**

22 A. The terms of this Order are applicable to information produced by a Non-
23 Party in this Action and designated as "CONFIDENTIAL" or "HIGHLY
24 CONFIDENTIAL – ATTORNEYS' EYES ONLY." Such information produced by

1 Non-Parties in connection with this litigation is protected by the remedies and
2 relief provided by this Order. Nothing in these provisions should be construed
3 as prohibiting a Non-Party from seeking additional protections.

4 B. In the event that a Party is required, by a valid discovery request, to
5 produce a Non-Party's confidential information in its possession, and the Party
6 is subject to an agreement with the Non-Party not to produce the Non-Party's
7 confidential information, then the Party shall:

8 1. Promptly notify in writing the Requesting Party and the Non-Party
9 that some or all of the information requested is subject to a
10 confidentiality agreement with a Non-Party;

11 2. Promptly provide the Non-Party with a copy of the Protective
12 Order in this Action, the relevant discovery request(s), and a reasonably
13 specific description of the information requested; and

14 3. Make the information requested available for inspection by the
15 Non-Party, if requested.

16 C. If the Non-Party fails to seek a protective order from this court within 14
17 days of receiving the notice and accompanying information, the Receiving Party
18 may produce the Non-Party's confidential information responsive to the
19 discovery request. If the Non-Party timely seeks a protective order, the
20 Receiving Party shall not produce any information in its possession or control
21 that is subject to the confidentiality agreement with the Non-Party before a
22 determination by the court. Absent a court order to the contrary, the Non-Party
23 shall bear the burden and expense of seeking protection in this court of its
24 Protected Material.

1 **XI. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL**

2 A. If a Receiving Party learns that, by inadvertence or otherwise, it has
3 disclosed Protected Material to any person or in any circumstance not
4 authorized under this Protective Order, the Receiving Party must immediately
5 (1) notify in writing the Designating Party of the unauthorized disclosures, (2)
6 use its best efforts to retrieve all unauthorized copies of the Protected Material,
7 (3) inform the person or persons to whom unauthorized disclosures were made
8 of all the terms of this Order, and (4) request such person or persons to execute
9 the “Acknowledgment and Agreement to be Bound” that is attached hereto as
10 Exhibit A.

11 **XII. PRIVILEGED OR OTHERWISE PROTECTED MATERIAL**

12 A. Privilege Logs: When withholding information as subject to a claim of
13 privilege or other protection, the Designating Parties obligations are set forth in
14 Federal Rule of Civil Procedure 26(b)(5)(A), except the Designating Party shall
15 have no obligation to log protected information generated after the filing of this
16 lawsuit.

17 B. Inadvertent Production: When a Producing Party gives notice to
18 Receiving Parties that certain inadvertently produced material is subject to a
19 claim of privilege or other protection, the obligations of the Receiving Parties are
20 those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). The inadvertent
21 production of privileged material will not waive the attorney-client privilege or
22 the attorney work-product doctrine, or be used in any manner as evidence in
23 support of any such alleged waiver. This provision is not intended to modify
24 whatever procedure may be established in an e-discovery order that provides for

1 production without prior privilege review. Pursuant to Federal Rule of Evidence
2 502(d) and (e), insofar as the parties reach an agreement on the effect of
3 disclosure of a communication or information covered by the attorney-client
4 privilege or work product protection, the parties may incorporate their
5 agreement in the Protective Order submitted to the Court.

6 **XIII. MISCELLANEOUS**

7 **A. Right to Further Relief**

8 1. Nothing in this Order abridges the right of any person to seek its
9 modification by the Court in the future.

10 **B. Right to Assert Other Objections**

11 1. No Party waives any right it otherwise would have to object to
12 disclosing or producing any information or item on any ground not
13 addressed in this Protective Order. Similarly, no Party waives any right to
14 object on any ground to use in evidence of any of the material covered by
15 this Protective Order.

16 **C. Filing Protected Material**

17 1. A Party that seeks to file under seal any Protected Material must
18 comply with Civil Local Rule 79-5. Protected Material may only be filed
19 under seal pursuant to a court order authorizing the sealing of the specific
20 Protected Material at issue. If a Party's request to file Protected Material
21 under seal is denied by the Court, then the Receiving Party may file the
22 information in the public record unless otherwise instructed by the Court.
23
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1 **XIV. FINAL DISPOSITION**

2 A. After the final disposition of this Action, as defined in Section V, within
3 sixty (60) days of a written request by the Designating Party, each Receiving
4 Party must return all Protected Material to the Producing Party or destroy such
5 material. As used in this subdivision, “all Protected Material” includes all copies,
6 abstracts, compilations, summaries, and any other format reproducing or
7 capturing any of the Protected Material. Whether the Protected Material is
8 returned or destroyed, the Receiving Party must submit a written certification to
9 the Producing Party (and, if not the same person or entity, to the Designating
10 Party) by the 60 day deadline that (1) identifies (by category, where appropriate)
11 all the Protected Material that was returned or destroyed and (2) affirms that the
12 Receiving Party has not retained any copies, abstracts, compilations, summaries
13 or any other format reproducing or capturing any of the Protected Material.
14 Notwithstanding this provision, Counsel are entitled to retain an archival copy of
15 all pleadings, motion papers, trial, deposition, and hearing transcripts, legal
16 memoranda, correspondence, deposition and trial exhibits, expert reports,
17 attorney work product, and consultant and expert work product, even if such
18 materials contain Protected Material. Any such archival copies that contain or
19 constitute Protected Material remain subject to this Protective Order as set forth
20 in Section V.

1 B. Any violation of this Order may be punished by any and all appropriate
2 measures including, without limitation, contempt proceedings and/or monetary
3 sanctions.

4 **FOR GOOD CAUSE SHOWN, IT IS SO ORDERED.**

5
6 Dated: December 21, 2018

/s/ Autumn D. Spaeth

THE HONORABLE AUTUMN D. SPAETH
United States Magistrate Judge

EXHIBIT A
ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of _____
_____ [print or type full address], declare under penalty of perjury that I
have read in its entirety and understand the Protective Order that was issued by the
United States District Court for the Central District of California on [DATE] in the case
of Physicians Healthsource, Inc. v. Masimo Corporation, et al., 14-cv-00001 JVS
(ADSx). I agree to comply with and to be bound by all the terms of this Protective
Order and I understand and acknowledge that failure to so comply could expose me to
sanctions and punishment in the nature of contempt. I solemnly promise that I will not
disclose in any manner any information or item that is subject to this Protective Order
to any person or entity except in strict compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court
for the Central District of California for the purpose of enforcing the terms of this
Protective Order, even if such enforcement proceedings occur after termination of this
action. I hereby appoint _____ [print or type full name] of
_____ [print or type full address and telephone number] as
my California agent for service of process in connection with this action or any
proceedings related to enforcement of this Protective Order.

Date: _____

City and State where sworn and signed: _____

Printed Name: _____

Signature: _____